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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 373

ROY R. TORCASO,

Appellant,

v.

CLAYTON K. WATKINS,
CLERK OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF OF APPELLEE

OPINIONS BELOW

The opinions delivered in the courts below are as follows:

1. The Circuit Court for Montgomery County, Maryland, sustained a demurrer to a petition for writ of mandamus filed by the Appellant and held that the provision of Article 37 of the Declaration of Rights of the Maryland Constitution was a qualifying condition for citizens who desired to be public officers of this State, and that said Article does not violate the provisions of the First or

Fourteenth Amendments to the Constitution of the United States. This opinion is not officially reported, but appears in the Record (R. 7-10).

2. The Court of Appeals of Maryland affirmed the judgment of the Circuit Court for Montgomery County, holding that the provisions of Article 37 of the Declaration of Rights of the Constitution of Maryland do not violate the provisions of the First and Fourteenth Amendments to the Constitution of the United States. This opinion is officially reported at 223 Md. 49 and 162 A. 2d 438, and also appears in the Record (R. 12-19).

JURISDICTION

The jurisdiction of this Court is governed by 28 U.S.C., Section 1257(2). Probable jurisdiction was noted by this Court on November 7, 1960, 364 U.S. 877.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this appeal are Article 37 of the Declaration of Rights of the Maryland Constitution and the First and Fourteenth Amendments to the Constitution of the United States, all of which are set forth verbatim on page 2 of the Appellant's brief.

QUESTIONS PRESENTED

1. Does Article 37 of the Declaration of Rights of the Maryland Constitution, which requires "a declaration of belief in the existence of God" as a qualification for "any office of profit or trust in this State", violate the ban contained in the First Amendment to the Constitution of the United States respecting the establishment of religion or prohibiting the free exercise thereof?

2. Has the Appellant been denied due process of law or equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

3. Does Article 37 of the Declaration of Rights of the Maryland Constitution violate the provisions of Article 6 of the Constitution of the United States?

STATEMENT OF THE CASE

The Appellant filed a petition for a writ of mandamus against the Clerk of the Circuit Court for Montgomery County praying that the Clerk be commanded to render the oath or affirmation set forth in Article I, Section 6, of the Constitution of the State of Maryland, and that the Clerk further be commanded to issue unto the petitioner a commission as a Notary Public in and for Montgomery County, Maryland. A demurrer was filed on behalf of the Clerk to said petition. The petition alleged that the Appellant, a citizen of the United States and a resident of Montgomery County for more than the two years previous, had been duly appointed by the Governor as a Notary Public in and for that County, but when the Appellant went to the Clerk's office to obtain his commission and qualify for the office, the Clerk requested him to take and subscribe to a certain oath and declaration. The Appellant refused to do so, and thereupon the Clerk refused to deliver the commission to the Appellant. The oath and declaration are fully set forth in the Record (R. 3). In his petition for a writ of mandamus, the Appellant stated "* * * that he would not declare that he believed in the existence of God. * * *" (R. 3), and because of this the Clerk refused to issue a commission. The petition does not set forth any facts showing that the Appellant refused to make such a declaration because of any religious scruples and, in fact, sets forth no reason

other than his belief that said requirement is unconstitutional. Since there was no trial on the merits, the Appellant's religious affiliation, or lack of it, was never developed and, therefore, does not appear in the Record.

SUMMARY OF ARGUMENT

I. The Maryland constitutional provision requiring as a qualification for public office a belief in the existence of God does not violate the provisions of the First Amendment to the Constitution of the United States, either in itself, or as embodied in the Fourteenth Amendment, since it does not relate to the establishment of religion or prohibit the free exercise thereof, but rather recognizes and reaffirms the organic utterances of the people that this is a religious nation.

Said oath does not prefer one religion over another or aid all regligions, but merely establishes a reasonable qualification for the holding of public office in the State of Maryland, which has been recognized by this Court as being competently within the judgment of the states in establishing the conditions and qualifications for holding state office.

II. It has long been recognized that the holding of State office is a privilege of State citizenship and the denial by State action of the privilege to be a candidate for State office is not a denial of due process of law or equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III. The constitutional provision contained in Article 6 of the Constitution of the United States expressly was never intended to apply to State officers, and further, this question was not specifically passed upon by the Court of Appeals of Maryland and was not mentioned in Appel-

lant's brief in said Court. The Court of Appeals found that the Appellant did not press its contention that the provisions of Article 6 of the Constitution of the United States is applicable to the states (R. 17). Having abandoned this argument below, it is improper for this Court to rule on this issue. See *Nelson v. County of Los Angeles*, 362 U.S. 1; *Adler v. Board of Education*, 342 U.S. 485.

ARGUMENT

I.

Article 37 of the Declaration of Rights of the Maryland Constitution, which requires "A Declaration of Belief in the Existence of God" as a qualification for "Any Office of Profit or Trust in this State", Does Not Violate the Ban contained in the First Amendment to the Constitution of the United States respecting the Establishment of Religion or Prohibiting the Free Exercise Thereof.

From the beginning of the history of our nation, there has been a realization and recognition in all branches of our Government of the existence of a Supreme Being in the conduct of our affairs. This was clearly recognized in the Declaration of Independence, where it was stated as follows:

> "We hold these truths to be self-evident, that all men are created equal, that they are *endowed by their Creator* with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. * * *
>
> "We, therefore, the representatives of the United States of American, in General Congress assembled, *appealing to the Supreme Judge* of the world for the rectitude of our intentions, do, in the name and by authority of the good people of these Colonies, solemnly publish and declare * * *; and

"For the support of this declaration, with a firm reliance on the *protection of Divine Providence*, we mutually pledge to each other our lives, our fortunes and our sacred honor." (Emphasis supplied.)

This realization and recognition of the existence of a Supreme Being continues today, and particularly when relating to public officers and the conduct of their official affairs. The constitutions of at least seven states, in addition to Maryland expressly require a belief in the existence of a Supreme Being as a qualification for public office.[1] Further, several states by constitution or statute prescribe mandatory oaths of office ending in the words "So

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[1] *Arkansas* — Art. 19, Sec. 1.
"No person who denies the being of a God shall hold any office in the civil department of this State, nor be competent to testify as a witness in any court."

Mississippi — Art. 14, Sec. 265.
"No person who denies the existence of a Supreme Being shall hold any office in this State."

North Carolina — Art. VI, Sec. 8.
"The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God, * * *".

Pennsylvania — Art. 1, Sec. 4.
"No person who acknowledges the being of a God, and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth."

South Carolina — Art. 17, Sec. 4.
"No person who denies the existence of a Supreme Being shall hold any office under this Constitution."

Tennessee — Art. 9, Sec. 2.
"No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State."

Texas — Art. 1, Sec. 4.
"No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledged the existence of a Supreme Being."

help me God".[2] Title 5, U.S.C.A., Section 16, prescribes the oath to be taken by any person, elected or appointed, to any office of honor or profit in the civil, military or naval service, except the President of the United States, and concludes with the supplication, "So help me God".[3] Likewise, Federal judges, including the members of this Honorable Court, qualify by being sworn into office with a mandatory oath that concludes "So help me God".[4]

In our executive branch of Government, the new Chief Executive implored the people of the United States to rely

[2] For example, Article 16, Alabama Constitution
Article 38-31 Arizona Revised Statutes
Title 98-1-1 Colorado Statutes
Title 1, Sec. 25, Connecticut Statutes
Article 16, Sec. 2, Florida Constitution
Article 71-103, Georgia Statutes
Article 19, Sec. 1, Louisiana Constitution
Article 9, Sec. 1, Maine Constitution
Article 15, Sec. 2, Nevada Constitution
Sec. 211, North Dakota Const.
Sec. 34, Virginia Const.

[3] See also 39 U.S.C.A. 3103, setting forth the oath of the Postmaster General and all employees of the Postal Service, which also ends with the words "So help me God". This statute was repealed and re-enacted with slight amendment by Public Law 86-682, approved September 2, 1960.

[4] Title 28, U.S.C., Sec. 453, reads as follows:
"Oaths of justices and judges.
Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, , do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as according to the best of my ability and understanding, agreeably to the Constitution and laws of the United States. So help me God'." June 25, 1948, c. 646, 62 Stat. 907.

upon the will of the Almighty God.[5] In addition, Congress, the legislative branch of our national Government, daily invokes divine blessings and guidance for their proceedings (See dissenting opinion of Mr. Justice Reed in *McCollum v. Board of Education*, 333 U.S. 203). Similarly, Congress has prescribed a Pledge of Allegiance to the Flag of the United States, exclaiming that this is "One Nation Under God" (36 U.S.C.A., 172); our coins, by legislative enactment, declare "In God We Trust" (31 U.S.C.A. 324); also, the second stanza of our National Anthem reverently proclaims "And this be our Motto, 'In God is our Trust' ".

QUERY: Are not the oaths required by the constitutions and statutes of the various states, as well as the United States, an expression of the people of a moral accountability by all public officials who enter into the public service of their state or of their country? The question therefore arises whether a belief in moral accountability for conduct is inconsistent with religious liberty in this nation.

The provisions of Article 37 of the Declaration of Rights of the Maryland Constitution were expressly reviewed by this Court in an unanimous opinion written by Mr. Justice Brewer in *Church of the Holy Trinity v. United States*, 143 U.S. 457. In that case the Court was called upon to de-

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[5] Inaugural Address of President Kennedy, January 20, 1961.

"We observe today not a victory of party but a celebration of freedom — symbolizing an end as well as a beginning — signifying renewal as well as change. For I have sworn before you and Almighty God the same solemn oath our forebears prescribed nearly a century and three quarters ago.

"The world is very different now. For man holds in his mortal hands the power to abolish all form of human poverty and all form of human life. *And yet the same revolutionary beliefs for which our forebears fought are still at issue around the globe — the belief that the rights of man come not from the generosity of the state but from the hand of God.*" (Emphasis supplied.)

termine whether an Act of Congress prohibiting the importation of aliens under contract included a contract for the immigration of members of the clergy. The Court, in finding that Congress never intended to include members of religious societies who migrated to the United States, reviewed *the historical religious background of* this nation and said:

> "* * * But beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or nation, because this is a religious people. This is historically true. From the discovery of this continent to the present hour there is a single voice making this affirmation."

In reviewing the historical support for this assertion, Mr. Justice Brewer in the opinion expressly cited and quoted the provisions found in Articles 36 and 37 of the Declaration of Rights of the Constitution of Maryland, being the very same provisions now under attack. The Court concluded:

> "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. * * *".

More recently, in *United States v. Macintosh*, 283 U.S. 605, this Court denied an application for naturalization of a person who refused to make a declaration that he was willing to support the Constitution, even to the extent of bearing arms in any war unless he regarded it as morally justified. Mr. Justice Sutherland, speaking for a majority of the Court, stated:

> "* * * We are a Christian people * * *, according to one another the equal right of religious freedom

and acknowledging with reverence the duty of obedience to the will of God. * * *".

Mr. Chief Justice Hughes, (Justices Holmes, Brandeis and Stone, concurring) in dissenting stated:

> *"One cannot speak of religious liberty with proper appreciation of its essential and historic significance without assuming the existence of a belief in supreme allegiance to the will of God.* * *". (Emphasis supplied.)

Cf. *Girouard v. U. S.*, 328 U.S. 61.

In *Zorach v. Clauson*, 343 U.S. 306, Mr. Justice Douglas, speaking for a majority of the Court, exclaimed:

> *"We are a religious people whose institutions presuppose a Supreme Being.* We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our tradition. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. * * *". (Emphasis supplied.)

The Appellant, in his brief, argues that the First Amendment to the Constitution of the United States equally permits freedom for those who entertain non-theistic beliefs as well as for those who entertain theistic beliefs. Ap-

pellee respectfully submits that the Constitution of Maryland, Article 36 of the Declaration of Rights, fully guarantees the right of an individual to worship in such manner as is most acceptable to him. The State of Maryland, by requiring as a qualification of office a belief in the existence of God, is in no way infringing upon the freedom of the Appellant or anyone else to hold any belief whatsoever The State of Maryland does not endeavor to force or influence the Appellant to attend or remain away from any church, or to force him to profess or express belief in any religion. The Appellant does not allege, nor is it a fact, that he will be punished or otherwise injured by his refusal to express a belief in the existence of God. There is no allegation that his religious practices, or the lack of them, have interfered with any of his rights of citizenship, or that he has been required to worship other than in accordance with the dictates of his own conscience.

The position of Notary Public which the Appellant seeks is a public office in the State of Maryland and there is no constitutional or inherent right to hold public office, but that is a political privilege. *Taylor v. Beckham*, 178 U.S. 548; *Bailey v. Richardson*, 182 F. 2d 46, 59, aff'd. per curiam by an equally divided court, 341 U.S. 918.

The unwillingness of the Appellant to declare his belief in the existence of God clearly makes him not qualified to hold public office in Maryland. This Court has on several occasions recognized that the holding of State office or employment is a privilege, the qualifications for which may be established by State constitutional laws, as long as they are not unreasonable and discriminatory. In *Garner v. Board of Public Works*, 341 U.S. 716, Mr. Justice Clark, speaking for a majority of the Court, stated as follows:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into determining fitness for both high and low positions in private industry and are not less relevant in public employment. * * *".

To the same effect, see *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56; *Adler v. Board of Education*, 342 U.S. 485; and *Slochower v. Board of Education*, 350 U.S. 551.

The responsibility for establishing requirements as to the qualifications of its public officers rests with the people of Maryland. *In re Summers*, 325 U.S. 561; *Nelson v. County of Los Angeles*, *supra*.

The Appellant further contends that his inability to qualify for public office constitutes an impairment of religious liberty and is an interference of the free exercise of religion. The Appellee believes that this assertion is neither supported in fact nor in law. There is no contention in the petition for writ of mandamus that the Appellant has in any way been denied any religious liberty, nor that he has been in any way restrained from the manner in which he can exercise his beliefs. This Court on many occasions has reviewed state statutes which allegedly interfere with religious liberty, but the court has never found such State action improper. In *Davis v. Beason*, 133 U.S. 333, this Court considered an Act of Congress which outlawed bigamy and polygamy in the territory of Idaho. The law provided that anyone who failed to take an oath which, in essence, stated that he did not belong to any order, organization or association which *believed* in the

practice of such act or which practiced polygamy or bigamy, did not qualify to hold public office. This Court held that the law did not violate the First Amendment to the United States Constitution and stated:

> *"The term 'religion' has reference to one's views of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to His will. It is often confounded with the Cultus or form of worship of a particular sect, but is distinguishable from the latter.* The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. * * *".
>
> "It is assumed by counsel of the petitioner that, because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. * * *". (Emphasis supplied.)

See also *Reynolds v. United States*, 98 U.S. 145; and *Murphy v. Ramsey*, 114 U.S. 15. Again this Court in the case of *Hamilton v. University of California*, 293 U.S. 245, held that the refusal, on religious grounds, to participate in compulsory military instruction in state-operated land grant colleges was ground for dismissal and that the liberty of the students who so refused had not been infringed

upon. Mr. Justice Cardozo, in his concurring opinion, commented as follows:

> "Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. * * *".

See also *Hanauer v. Elkins*, 217 Md. 213, __ A. 2d __; *North v. University of Illinois*, 27 N.E. 54. Congress, in the Universal Military Training and Service Act of 1948 (50 U.S.C., App. Sec. 456(j)), stipulated that to be exempt from military service on the grounds of "religious training and belief", such belief must relate to a "Supreme Being" and cannot be "a merely personal moral code". See *George v. United States*, 196 F. 2d 445, 450; cert. den. 344 U.S. 843.

The Appellant, in his brief, relies heavily upon dictum of this Court in the cases where the questions of religion and public education have come into conflict. It is interesting to note that in all except one (*McCollum v. Board of Education*, 333 U.S. 203), the Court has declined to find an unconstitutional establishment of or aid to religion. In *Quick Bear v. Leupp*, 210 U.S. 50, it was held that payments to Indians for religious education of Indian children was not unconstitutional. Subsequently, in *Cochran v. Louisiana*, 281 U.S. 370, the Court upheld the expenditure of public funds raised by taxation for the supplying of free school books to children attending school, whether public or private, sectarian or non-sectarian. In *Everson v. Board of Education*, 330 U.S. 1, this Court was requested to declare unconstitutional an act of the New Jersey Legislature which authorized reimbursement to parents of transportation fees paid for transporting their children to private schools, including sectarian schools.

The Court held that the First Amendment to the United States Constitution did not prohibit New Jersey from spending tax-raised funds to pay bus fares for parochial school pupils as a part of the general program under which it pays the fees of pupils attending public and other schools. The majority of the court, in the opinion written by Mr. Justice Black, stated the protection of the First Amendment as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"

It is important to note that the activity of the State of Maryland and its sister states in requiring its public officers to express a belief in the existence of God or moral accountability to God do not in any way contravene any of the propositions above set forth.

Thereafter, in *McCollum v. Board of Education*, 333 U.S. 203, it was held that religious instruction during "released time" in property owned by the Board of Education was allowing public school buildings to be used for religious